IN FOCUS

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Antitrust Law: An Introduction

Recent years have witnessed a resurgence of both popular and political interest in antitrust. This renewed attention has produced a flurry of legislative activity, with several Members of Congress introducing proposals to reform various elements of competition law. This In Focus provides an overview of antitrust doctrine and selected antitrust legislation pending before Congress.

The Goals of Antitrust

The antitrust laws are designed to protect economic competition. At that level of generality, there is little controversy. However, there is profound disagreement about antitrust's more specific goals. Safeguarding "competition" can mean a variety of things, and disputes about the appropriate targets of antitrust policy have persisted since its inception.

Economists tend to approach this issue with similar discussions of the effects of *market power*—the ability of a firm to profitably charge prices above levels that would prevail in a competitive market. Economic theory identifies two relevant effects. First, market power can produce *allocative inefficiency*: when prices exceed competitive levels, some consumers who would have purchased a product at the competitive price choose to forgo it or substitute less desired alternatives. Thus, market power can lead to suboptimal allocations of scarce resources. Second, market power can result in *wealth transfers*: consumers who buy a product at an uncompetitive price are poorer than they would be in a competitive market, while the seller is richer.

Today, antitrust is principally concerned with preventing anticompetitive conduct that enables firms to exercise market power. However, the distinct effects of market power highlight a fissure in the debate over antitrust's more foundational goals. In a narrow subset of cases, efficiency and consumer welfare may pull in opposite directions. For example, some mergers may lower production costs, but also increase market power. Some commentators—advocates of a "total welfare" standard—maintain that antitrust should permit such transactions as long as the gains in productive efficiency outweigh the losses in allocative efficiency and consumer welfare. By contrast, defenders of the "consumer welfare" standard advocate blocking such deals when they are likely to effectuate a wealth transfer from consumers to producers. Although the competition laws of some countries embrace the total-welfare standard, U.S. antitrust doctrine prioritizes consumer welfare and does not typically permit producer gains to offset downstream harms.

While the consumer-welfare standard thus plays a central role in contemporary U.S. antitrust, some have suggested that it is both descriptively and normatively incomplete. One point of contention involves anticompetitive conduct by *buyers*, which most directly harms sellers rather than end consumers. Whether—and how—such harms are relevant under the consumer-welfare standard is a complicated question. In some cases, reductions in buy-side competition *do* harm consumers. For example, a merger that gives a firm the ability to depress input prices by purchasing less may harm consumers by leading to lower output. In other buy-side cases, however, injuries may be limited to sellers. For example, a merger might increase a firm's bargaining leverage with suppliers without giving it incentives to purchase fewer inputs. In that case, the main effect of diminished competition may be a wealth transfer from sellers to the powerful buyer, without any effects on final output. Powerful buyers may even benefit consumers by passing along some of their cost savings. Some commentators have appealed to these fact patterns to argue that "trading partner welfare" or safeguarding the "competitive process" represent more descriptively accurate and normatively desirable benchmarks for antitrust policy than consumer welfare. The possible tension between these goals and the consumer-welfare standard may become increasingly salient as antitrust enforcers take a greater interest in labor markets, where workers rather than consumers are the most direct victims of anticompetitive conduct.

The above discussion does not exhaust the possible ends that antitrust can serve. There is a long-standing debate over whether antitrust should promote "noneconomic" objectives like personal liberty, protecting small entrepreneurs, or preserving the integrity of the political process. Although there has recently been a resurgence of interest in such goals among some antitrust commentators, those considerations have not played an explicit role in the development of antitrust decision rules for several decades.

The Key Statutes

The persistence of disputes over antitrust's goals may be partially attributable to the sparseness of the key federal antitrust statutes. The three core provisions—Sections 1 and 2 of the Sherman Act and Section 7 of the Clayton Act—are succinct and vague, effectively granting the federal courts common law authority to fashion competition policy based on prevailing economic theories.

Section 1 of the Sherman Act: Restraints of Trade

Section 1 of the Sherman Act prohibits contracts "in restraint of trade." Under Section 1 doctrine, a few types of agreements are *per se* illegal because they almost always harm competition. The *per se* category now encompasses horizontal price fixing, horizontal market allocation, and some horizontal boycotts. (In antitrust parlance, agreements between competitors are described as "horizontal," while agreements between firms at different points in a distribution chain are described as "vertical.")

While a narrow range of conduct remains *per se* illegal under Section 1, most agreements are evaluated under what is called the *Rule of Reason*, which requires plaintiffs to establish that a defendant has market power and that a challenged restraint harms competition. Today, many horizontal restraints and all vertical restraints except tying arrangements—which are governed by a special test—are subject to the Rule of Reason. Courts ordinarily employ some variation of a three-part burden-shifting framework in Rule-of-Reason cases. Under that framework, plaintiffs bear the initial burden of proving that a challenged restraint has a substantial anticompetitive effect. If the plaintiff carries that burden, the defendant must then adduce a procompetitive rationale for the restraint. If the defendant can do so, then the burden shifts back to the plaintiff to show that the procompetitive efficiencies could be reasonably achieved through a less anticompetitive means.

Federal courts have also held that some restraints that are not *per se* illegal can nevertheless be condemned under Section 1 without a full Rule-of-Reason analysis. The framework for these "quick look" cases is not definitively settled, but the basic idea is that some types of conduct are inherently suspect even if they are not *per se* illegal. As a result, plaintiffs can prevail in such cases without detailed market analysis or proof of anticompetitive harm. Courts have applied the "quick look" analysis to horizontal restraints involving self-regulation of learned professions, output restrictions in markets that require some cooperation among competitors, and anticompetitive agreements that arguably have noncommercial motivations.

Section 2 of the Sherman Act: Monopolization

While Section 1 of the Sherman Act governs multilateral restraints of trade, Section 2 prohibits unilateral anticompetitive conduct by dominant firms—in a word, monopolization. Section 2 does not prohibit "bigness" standing alone. Rather, monopolization is a two-element offense: plaintiffs must establish that a firm with *monopoly power* (a large degree of market power) engaged in *exclusionary conduct*.

Courts and legal academics have struggled to formulate a general standard for distinguishing exclusionary conduct from legitimate competition on the merits. Instead of relying on such a standard, the case law has developed a variety of conduct-specific tests, along with a burden-shifting framework that broadly mirrors the Rule-of-Reason inquiry under Section 1. While a detailed review of monopolization law is beyond the scope of this introduction, much of the conduct challenged under Section 2 falls into the following categories: *exclusionary pricing* (e.g., below-cost pricing intended to eliminate rivals); *refusals to deal* (e.g., denial of access to essential infrastructure or technology); *exclusionary distribution* (e.g., tying, bundling, or exclusive dealing); *misuse of institutions* (e.g., abuse of standard-setting organizations or enforcement of fraudulent patents); and *exclusionary product design* (i.e., designing products in ways that make it difficult for rivals to produce substitutes).

Section 7 of the Clayton Act: Mergers

Section 7 of the Clayton Act prohibits mergers and acquisitions that threaten "substantially to lessen competition, or to tend to create a monopoly." Today, merger control is largely a bureaucratic affair. The Department of Justice and Federal Trade Commission—the federal antitrust enforcers—play a central role in merger law via the Hart-Scott-Rodino "preclearance" process and the promulgation of merger guidelines. Substantively, Section 7 doctrine has shifted from a largely structural approach that prevailed in the 1950s and 1960s—which heavily emphasized market concentration levels and was highly skeptical of consolidation—to more flexible inquiries into the details of specific industries and theories of harm. In horizontal mergers, the regulators typically evaluate two possible harms: *coordinated effects* (i.e., whether a transaction will facilitate collusion or parallel pricing) and *unilateral effects* (i.e., whether a transaction will give a firm unilateral pricing power). In vertical mergers, by contrast, the agencies assess whether a transaction will foreclose rivals' sources of supply or distribution, raise entry barriers, facilitate the exchange of competitively sensitive information, or enable collusion.

Selected Legislation

In recent years, Congress has considered several bills that would modify various aspects of antitrust and competition law. In the 118th Congress, S. 4308 would establish more relaxed standards for plaintiffs alleging exclusionary conduct under a new section of the Clayton Act. The bill also would make merger law more restrictive by requiring the parties to certain large mergers to bear the burden of proving that their transactions would not harm competition.

Other legislation is more narrowly targeted. S. 3686, for example, would establish a presumption that certain conduct involving pricing algorithms constitutes an antitrust violation, while S. 2818 would prohibit mergers in the meatpacking industry that result in specified levels of concentration.

Some proposals would reach beyond general antitrust law and impose special competition rules on large technology platforms. S. 2597 would create a new federal agency charged with regulating tech platforms across a variety of dimensions, including competition. Other bills would establish rules addressing platform self-preferencing (S. 2033) and interoperability and data portability (S. 2521).

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